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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ALABAMA,

Petitioner

V.

CHRIS PRINCE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT AND COURT OF CRIMINAL APPEALS OF ALABAMA

OF

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JOSEPH G. L. MARSTON, III
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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

Under the doctrine of Collateral Estoppel, where a single perpetrator rapes and robs a woman and a certain defendant is charged separately with both crimes and is acquitted of rape:

1. In determining if the issue of identity was resolved in the defendant's favor so as to bar the robbery prosecution, should a court look only to the defense evidence in the rape trial or should the court also consider the State's evidence, the matters brought out on cross examination of the State's witnesses, the charge to the jury, etc.?

2. Is the robbery prosecution barred by the acquittal of rape, where the state's evidence in the rape trial (1) that a violent attack on the victim occurred was undisputed and (2) that the defendant was the perpetrator was strong but (3) the State's evidence as to the

corpus delecti of rape was probably insufficient to prove rape, (4) defense raised questions relating the corpus delecti on cross examination and (5) the trial court's charge to the jury emphasized the corpus delecti of rape and did not authorize conviction of lesser included offenses?

THE PARTIES

In the Circuit Court of Mobile County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Chris Prince, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Mobile County, Alabama and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama reversing and rendering Respondent Prince's conviction is not as yet reported but will be reported as follows:

Prince v. State, ____ So. 2d ____ (Cr. App. Ala., 1982)

A copy of the same is submitted in Appendix "A" to this petition.

The order of the Supreme Court of Alabama denying the writ of certiorari in this case is not as yet reported but will be reported as follows:

Ex parte: State; In re: Prince v. State, ____ So. 2d ____ (S. Ct. Ala., 1983)

A copy of the same is submitted in Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying the writ in this case "...on federal constitutional grounds...." was issued on April 22, 1983, and this petition is filed within sixty days of that date.

The Jurisdiction of this Honorable Court is invoked under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States, which reads as follows:

> "No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied)

2. Section one of the Fourteenth Amendment to the Constitution of the United States which reads as follows:

"...All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws...."

STATUTORY PROVISIONS INVOLVED

Respondent Prince was charged with and acquitted of rape under Title 13A-6-61(a)(1), Code of Alabama, 1975, which reads as follows:

> "§13a-6-61. Rape in the first degree.
>
> ..."(a) A male commits the crime of rape in the first degree if:
>
> (1) He engages in sexual intercourse with a female by forcible compulsion;..." (See Appendix "C", page 24)

At issue in this case is whether that aquittal of rape barred a prosecution and conviction for robbery under Title 13A, Section 13A-8-43(a), Code of Alabama, 1975, which reads as follows:

> §13A-8-43. Robbery in the third degree.
>
> (a) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property. (See Appendix "C", page 28)

STATEMENT OF THE CASE

I.

SUMMARY STATEMENT

Respondent Chris Prince was indicted for several offenses arising out of a violent attack on a young woman; this case involves two of these offenses: rape and robbery.

Prince was tried for rape first. The State's evidence on the corpus delecti of rape was weak and conflicting on vital points and was properly insufficient to prove rape as a matter of

law. By cross examination of the victim and the examining physician the defense emphasized these weaknesses and conflicts. On the other hand, the state's evidence as to the identity of Prince as the perpetrator of the attack was strong and was contradicted only the defendant's own testimony as to an alibi. After the State rested, the Defense moved to exclude the State's evidence on the grounds that the State had not proved a prima facie case of rape. The Court did not charge the jury on any lesser included offenses, and the jury acquitted Prince of rape.

Subsequently, Prince was tried for robbery. The evidence relating to the identity of Prince as the perpetrator was identical to that presented in the rape case, and it was not contested that the

perpetrator had stolen money from the victim. Prince was convicted of robbery.

On appeal the Court of Criminal Appeals of Alabama reversed and rendered Prince's robbery conviction under Ashe v. Swenson, (397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 [1970]). (Prince v. State, ____ So. 2d ____ [Cr. App. Ala., 1983]; Appendix "A") The Alabama Supreme Court declined to review the Court of Appeals' ruling "...on federal constitutional grounds...", saying that it could not distinguish Ashe v. Swenson, above from this case. (Prince v. State, ____ So. 2d [S. Ct. Ala., 1983]; Appendix "B")

II.

STATEMENT

As stated above, this case involves two trials: one for rape and the other for robbery. For the sake of clarity, each will be separately stated.

A.

THE RAPE CASE

Respondent Prince was indicted for rape in the first degree[1] and pleaded not guilty.[2]

On the trial of the case, the evidence in support of the rape charge came from the victim and the physician who examined her. The State's evidence on penetration[3] was imprecise and

---

[1] "(a) A male commits the crime of rape in the first degree if:
(1) He engages in sexual intercourse with a female by forcible compulsion:... (Title 13A, Section 13A-6-61, Code of Alabama, 1975; See Appendix "C", page 24)

[2]The record contains no pleadings from the rape trial, but the indictment for first degree rape and the plea of not guilty have been taken for granted.

[3]"The following definitions apply in ths article:
"(1) SEXUAL INTERCOURSE. Such term has its ordinary meaning and occurs upon any penetration, however slight; emission is not required...." (Title 13A, Section 13A-6-60, Code of Alabama, 1975; See Appendix "C", page 22; emphasis supplied)

probably insufficient[4], and, although non-consent was certainly implied by the victim, she was never asked directly if she consented to the intercourse. On cross-examination the defense brought out facts suggesting that the victim may not have been fully conscious or sober at the time of the actual rape. The Defense also raised questions as to the resistance made by the victim.[5] (D. Ex.[6], pp. R. 20-R. 59) The physician who

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[4]See the argument at pages 44-45, below.

[5]"The following definitions apply in this article:...
"(8) FORCIBLE COMPULSION. Physical force that overcomes earnest resistance...."
Section 13A-6-60, Code of Alabama, 1975; See Appendix "C", page 23 Emphasis supplied)

[6]"D. Ex. refers to the Defendant's Exhibit which is a transcript of the evidence in the rape trial and is a part of the record in this case.

examined the victim was unable to say whether her condition indicated rape. According to the doctor, there was evidence of sexual intercourse, but it may have occurred up to forty-eight (48) hours earlier. (D. Ex. pp. R. 70-R. 87)

As to the identity of Prince as the perpetrator of the attack, the State presented the evidence of the victim (who had observed the perpetrator for sometime prior to be struck in the head), and who gave the police a most detailed description of the perpetrator and identified Prince as the perpetrator shortly after the incident. (D. Ex. R. 31, R. 63. R. 69 and R. 87-91) In addition, the State presented the testimony of the police officer who, just minutes after the attack located the automobile which the perpetrator had stolen from the victim

being driven by Prince. (D. Ex. R. 102, R. 108) The defense presented an alibi through the defendant's own testimony. This testimony contradicted both that of the victim and the arresting officer. (D. Ex. pp. R. 142-167)

At the close of the State's evidence the defense made the following motion:

> "MR. ASHBEE [DEFENSE COUNSEL]: Your Honor, at this time the defense would move to exclude the State's evidence and to request a judgment of acquittal in favor of defendant on the basis that the State has not made out a prima facie case as to the indictments. And we request this as to all the charges in each of the indictments, specifically, we would also request these motions to be granted to the defendant with regard to the indictment concerning robbery...." (D. Ex. p. R. 140)

This was the occasion that Respondent Prince first raised the claim on which

he prevailed on appeal, namely, the State's failure to prove the corpus delecti of rape, collaterally estopped the robbery prosecution. The motion was overruled.

The Trial Court charged the jury in pertinent part as follows:

> "...There are many ways to state or describe the burden that is on the State of Alabama. I will tell you that before you can convict the accused on the indictment the prosecution must prove beyond a reasonable doubt each and every aspect of the elements of the offense charged. I will discuss these aspects with you momentarily. The law never imposes upon the defendant in a criminal case the burden or duty of calling any witness or producing any evidence. If two conclusions can be reasonably drawn from the evidence, one of innocence and one of guilt, the jury should adopt the one of innocence. The defendant enters this trial with a presumption of innocence. I have told you that though. And this presumption is a matter of

evidence and may in itself justify or require an acquittal even though, and generate a reasonable doubt and require an acquittal even though there would have been no reasonable doubt except for the presumption of innocence. Innocence of the defendant is presumed until his guilt is established by the evidence in all material aspects of the case beyond a reasonable doubt and to a moral certainty and it may also be said that evidence of guilt must be strong and cogent and unless it is so strong and cogent as to show that the defendant is guilty to a moral certainty, the defendant should be acquitted...." (D. Ex. pp. R. 172-R. 173; Emphasis supplied)

In addition the trial court charged the jury as follows:

"...Now, what are the elements of the offense of rape that the State must prove. The law says that man -- a male commits rape in the first degree if he engages in sexual intercourse with a female by forcible compulsion. Now what does this mean the State must prove? Well, the State must prove, first, that Chriss Prince is a male. Then the State must prove that he engaged in sexual intercourse and sexual intercourse has its ordinary

meaning and occurs upon any penetration however slight and that this sexual intercourse was accmplished by forceful compulsion. Forceful compulsion is defined as physical force that overcomes earnest resistance or a threat expressed or implied that places a person in fear of immediate death or serious physical injury...." (D. Ex. p. R. 175; Emphasis suppied)

The trial court did not charge on any lesser included offenses.[7] (D. Ex. pp. R. 171-R. 178)

Respondent Prince was acquitted of rape. (D.Ex. R.179)

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[7]The evidence would have supported several lesser included offenses including Assault in the first, second, or third degrees. (Title 13A, Sections 13A-6-20[a][4], 21 [a][1] and 22 [a][1], Code of Alabama, 1975) and sexual abuse in the first degree (Ibid, Section 13A-6-66[a][1]. See Appendix "C", pages 19-22 and 26)

B.

THE ROBBERY CASE

Respondent Prince was indicted for robbery in the first degree.[8] His plea was not guilty. (R. pp. 1-5)

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[8]"(a) A person commits the crime of robbery in the first degree if he violates section 13A-8-43 and he:

"(1) Is armed with a deadly weapon or dangerous instrument; or

"(2) Causes serious physical injury to another." (Title 13A, Section 13A-8-41, Code of Alabama, 1975)

"§13A-8-43. Robbery in the third degree.

"(a) A person commits the crime of robbery in the third degree if in the course of committing a theft he:

"(1) Uses force against the person of the owner or any person present with intent to overcome his physical resistance or physical power of resistance; or

"(2) Threatens the imminent use of force against the person of the owner or any person present with intent to compel acquiescence to the taking of or escaping with the property." (Ibid, Section 13A-8-43)

See Appendix "C", pages 27 -29.

Prior to the trial Prince filed a motion to dismiss raising again the matter at issue in this proceeding and claiming that the robbery charge should be dismissed because he had been acquitted of rape. This motion was overruled. (R. pp. 6-9)

The cause was tried on February 1-2, 1982. (R. pp. 10 and 15) Only the victim testified to the corpus delecti of robbery. She testified that Prince had stolen $70.00 from her by use of physical force. She stated that Prince told her that he had a gun, but she never saw it. (R. p. R. 28) The only reference to the rape in this trial was an unsolicited reference to it by the victim, which the trial court excluded from the jury's consideration. (R. p. R. 33) On cross examination the defense again questioned the victim's sobriety (R. p. R. 28) and

brought out again that she actually never saw a gun. (R. p. R. 42) (R. pp. R. 22, R. 34 and R. 37, R. 45) The evidence as to the identity of Prince as the perpetrator was, as the Court of Criminal Appeals found, identical to that presented in the rape case. (R. pp. R. 34, R. 37, R. 45-58, R. 60, R. 82 and R. 91-R. 101)

The Jury convicted Respondent Prince of robbery in the third degree.[9]

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[9]Presumably the jury found that Prince was not armed with a deadly or dangerous weapon at the time. Compare Title 13A, Sections 13A-8-41 and 43, Code of Alabama, 1975; Appendix "C", pages 27-29.

C.

APPEAL

Prince appealed to the Court of Criminal Appeals of Alabama. On December 28, 1982, the Court of Appeals reversed and rendered Prince's robbery conviction under this Honorable Court's decision in Ashe v. Swenson, (397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 [1970]). In applying Ashe the Court of Appeals looked only to the issue contested in the rape case by the defense evidence (i.e. identity) and ignored issues raised by the weakness of and conflicts in the State's evidence as well as matters raised by cross examination. In its opinion the Court of Criminal Appeals first set out the facts which the evidence presented by the State tended to prove. These facts were taken as

established, conflicts and important points brought out on cross examination being ignored. Then the Court then writes:

> "...Appellant's [i.e. Prince's] sole defense was an alibi and he was the only defense witness. He testified that...[Court set out a brief and accurate digest of Prince's testimony. Then the opinion continued]...Appellant, in summation, essentially conceded that the victim had been kidnapped, raped and robbed. His sole contention was that he was not the perpetrator of these crimes. He contended that the victim's blurred vision, and the bad lighting conditions led to her mis-identification...." (Prince v. State, ____ So. 2d ____ [Cr. App. Ala., 1983]; Appendix "A" page 7-8)

Prince, in the view of the Court of Criminal Appeals, "...essentially concede..." the rape, robbery and kidnapping by not introducing defense evidence to the contrary. The Court of

Appeals concluded:

> "We recognize that we are bound by the decision of the United States Supreme Court; however, serious reservations permeate our view of the Ashe decision. Be that as it may, we have absolutely no alternative under Ashe, not only to reverse this case, we are also compelled to render it.
>
> "REVERSED AND RENDERED.
>
> "All the Judges concur." (Prince v. State, ___ So. 2d ___ [Cr. App. Ala., 1983], Appendix "A", page 14)

The State applied for rehearing, but the application was overruled on February 1, 1983. (Appendix "A", page)

The Supreme Court of Alabama accepted the State's petition for a writ of certiorari, but on April 22, 1983, denied it, writing:

> "SHORES, JUSTICE.
>
> "The writ of certiorari is denied on federal constitutional grounds. We, like the Court of Criminal Appeals, are

unable to distinguish this case from Ashe v. Swenson, 397 U.S. 436 (1970).

"WRIT DENIED." (Prince v. State, ____ So. 2d [S. Ct. Ala., 1983]; Appendix "B"; emphasis supplied)

STATEMENT OF THE FACTS

The Court of Criminal Appeals of Alabama opinion contains a statement of the facts which is generally accurate except that it ignores matters brought out on cross examination, conflicts in the evidence and blends the evidence presented in the two trials. This statement is available to this Honorable Court in Appendix "A" at pages 1 to 10. Therefore, what is presented here will be an effort to briefly supplement the facts set out in the Court of Appeals' opinion.

I.

EVIDENCE RELATING TO THE CORPUS DELECTI OF RAPE AS PRESENTED IN THE RAPE TRIAL.

The victim testified that after the perpetrator had threatened her with a gun and had physically overpowered her at her apartment complex and forced her into her car, he drove her to Murphy High School. At that point the victim attempted to escape, but the perpetrator overpowered her in a terrific struggle during which the victim hit her head on the concrete several times. (D. Ex. R. 20-R. 22) The perpetrator told the victim to take her clothes off, which she did. The victim identified several blood stained items of clothing as her's. She stated that the blood stains were the result of the assault on her and that she was not

having her monthly period.[10] (D. Ex. pp. R. 22-R. 28) On the question of the element of sexual intercourse, the victim's testimony was general rather than specific.[11] She testified to two

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[10]"Q. Were you bleeding?

"A. I didn't have my period.

"Q. You did or didn't?

"A. Didn't." (D. Ex. p. 25)

This testimony would be apparently contradicted by the examining physician.

[11]The victim's most specific testimony on this key point was as follows:

"Q. Okay. He got on top of you. Then what happened?...

"A. He forced himself.

"Q. Okay. Describe if you can exactly what he did?

"A". He got on top of me and forced himself.

"Q. Did he force himself inside you?

"A". Yes....' (D. Ex. R. 28)

instances of sexual union, each lasting approximately ten (10) minutes.[12] (D. Ex. R. 28-R. 29)

On cross examination, the Defense brought out several times that at the time of the original abduction[12] as well as at the time of the actual sexual assault[13] the victim did not scream. The victim admitted that she never saw a gun

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[12]"Q. So would that be a total of twenty minutes...in all?

"A. About twenty minutes...." (D. Ex R. 29)

[13]"Q. ...But did you ever scream for help to anybody else in the apartments?

"A. No...." (D. Ex. R. 42)

[14]"Q. ...Did you ever scream or yell for help at that point [incident to the struggle at Murphy High School]?

"A. No...." (D. Ex. R. 50-R. 51)

or weapon[15] and that she did not resist the original abduction.[16] Further, the details of her undressing were carefully examined and the victim was led to contradict herself as to some of the details of how she came to remove her

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[15] "Q. [D]id you ever see a gun?

"A. No.

"Q. Did you ever see any kind of a weapon such as a stick?

"A. No.

"Q. Did you ever see anything at all in this person's hand?

"A. No...." (D. Ex. R. 41)

[16] "Q. Now while you were in the parking lot at Carriage Inn Apartments, did you ever struggle with this person to try and get away?

"A. No...." (D. Ex. p. R. 42)

clothing.[17] The defense brought out that the victim had medical problems which coupled with the blows to her head caused her vision to blur. (D. Ex. pp. R. 50 and R. 53-R. 56) (D. Ex. pp. R. 31-R. 69)

Doctor Andy John Wright examined the victim within a few hours of the attack. The doctor testified that at this time the victim had begun her menstral period, apparently contradicting the victim on this point. (D. Ex. p. R. 72-R. 73; Compare the testimony set out in note 10; page 23, above). The doctor stated that

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[17] "Q. ...Now, this person that attacked you, did they take your clothes off or did you take your clothes off?

"A. He proceeded to do it and I said I would do it.

"Q. You said you would do it?

"A. Yes...." (D. Ex. p. R. 51)

there were no cuts or tears to the victim's sexual organs and he described the victim as being, "...a woman accustomed to sexual intercourse...." (D. Ex. p. R. 73) Although the doctor would not testify that the victim had been raped, he did state that, "...It would have been certainly possible for her to have had sexual intercourse even unwilled sexual intercourse and to have had the examination that she had...." (D. Ex. p. R. 73) This was the doctor's strongest testimony as to the rape from the state's point of view. The doctor did confirm the presence of numerous external cuts, bruises and abrasions on the victim's body. (D. Ex. p. R. 70-R. 78)

On cross examination the doctor reiterated his dirct testimony. Based

on the number and condition of sperm present, the doctor set the time of the intercourse as follows: "...They had been there certainly less than 48 hours. In all likelihood less than 12 hours...." (D. Ex. p. R. 83) (D. Ex. p. R. 78-R. 86)

On this testimony the State's case for rape went to the jury.

II.

EVIDENCE RELATING TO ROBBERY.

Except for the testimony relating to rape, the victim's testimony in the robbery trial was substantially identical to that in the rape trial up to the point of the attack at Murphy High School (R. pp. R. 22-R. 34), except as follows: The victim testified that she held two jobs, a full time position at a loan company

and a part-time position as a cocktail waitress at a lounge. (R. p. R. 23) On the evening in question she had just received her wages in the amount of $70.00, which was in her purse. (R. p. R. 26) She testified that incident to her struggle with Respondent Prince, she tried to remove her purse from the car. Prince, however, took the purse from her by force, and removed from it the $70.00 she had earned. (R. p. R. 33) It was on this evidence that the robbery case went to the jury.

III.

EVIDENCE RELATING TO IDENTIFICATION IN BOTH TRIALS.

The Court of Criminal Appeals correctly found that the identification evidence was identical in both trials. Briefly, that evidence was as follows:

Prince was noticed by the victim at her apartment complex before the attack began. (D. Ex. pp. R-13-R-14; R. p. R. 27)

When the victim reached her car, Prince accosted her and forced her into her car, which he then drove to Murphy High School. (D. Ex. R-27-R-28; R. pp. R-14-R-15)

At Murphy High School the victim fought with Prince. (D. Ex. R-20-R-22; R. pp. R-30-R-32)

After escaping from Respondent Prince, the victim fled some distance until she spotted a police unit, which she flagged down. She gave the officers a complete description of Prince and her own automobile in which Prince had fled. (D. Ex. R. pp. R-30-R-31 & R-88-R-89; R. pp. R-34-36 & R-92-R-93)

Officer James Allen of the Mobile

Police Department was on routine patrol when he received a radio alert concerning the victim's automobile and the perpetrator-occupant. This was within the hour of the attack. Officer Allen observed the victim's automobile driven by a person matching the description of the perpetrator. Officer Allen pursued the vehicle until the perpetrator lost control of the vehicle and abandoned it. At this time the officer, in hot pursuit observed the driver of the victim's automobile get out of the car. (D. Ex. pp. R-102-106; R. pp. R-60-R-65)

Officer Allen positively identified Respondent Prince as the man he saw fleeing from the victim's automobile. (D. Ex. p. R-106 [18] &

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[18] "...Q. Do you see that person here today?

* * *

A. Yes. It's the Defendant right there...." (D. Ex. p. R-106)

R-67-R-68) [19]

Officer Allen lost sight of Respondent Prince momentarily but soon relocated him and arrested him. (D. Ex. R-106-108; R-65-R-68)

Minutes later the victim positively identified Respondent Prince as the man who had attacked and robbed her. (D. Ex. pp. R-89-91; R-36 & R-95)

The victim repeated this identification in open court. (D. Ex. p. 68; [20] R. pp. R-36-R-37)

19"...Q. And was that the same person you had seen leave...[the victim's] ...car?

A. Yes, it was..." (R. pp. R-67-R-68)

20"...Q. Now, ...[victim's name]..., of course, you understand the seriousness of the charges against the Defendant. I want to ask you are you absolutely sure that you made a correct identification?

A. Yes...." (D. Ex. p. R-68)

The Court of Criminal Appeals accurately digested the Defense evidence on identification as follows:

> "...Appellant's sole defense was an alibi and he was the only witness. He testified that he had spent six to eight hours on the night of April 10 and the morning of April 11 at a bar in Touminville. He spent most of that time dancing. He had nothing to drink but did smoke one joint. He was walking home between 4:00 A.M. and 5:00 A.M. when he noticed a police car trying to run him down. He ran to a friend's home and crawled in a window where he was soon apprehended by the police.
>
> Appellant explained that he was scared of the police and always ran when they approached him. He explained that he was a hardworking laborer and must have acquired the grass stain on his shirt and the soiled socks at work. He explained that he had worn his red undershorts for about a week prior to April 11 and that he had had sexual intercourse with a girlfriend earlier that week. He did not know his blood type. He did not know whether or not the girl he had had intercourse with was at that time in her period...."
> (Prince v. State, ___ So.2d ___ [Cr.App.Ala., 1983]; Appendix "A", page 7-8)

SUMMARY OF THE ARGUMENT

This case is the antithesis of Ashe v. Swenson, (397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 [1970]).

In Ashe v. Swenson, above, and earlier in United States v. Oppenheimer, (242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 3 A.L.R. 516 [1916]) this Honorable Court held that in applying the doctrine of collateral estoppel, the Court must (1) examine the entire record of the previous trial, including the pleadings, evidence, charge, etc. and (2) determine whether a rational jury could have grounded its verdict on any issue other than the one which the defendant seeks to foreclose in the second trial. In the instant case the Alabama Courts violated both parts of this rule.

In determining what issues were contested in the rape trial, the Alabama

Courts looked only to the matters contested by defense evidence and ignored the weakness of the evidence of rape, matters brought out on cross examination and the Trial Court's charge to the Jury. In determining that identification was the sole basis of the acquittal in the rape case, the Alabama Courts ignored the fact that the evidence was probably insufficient to prove rape. (Reynolds v. State, 274 Ala. 171, 146 So.2d 85 [1962]), as well as suggestions of matters which often produce arbitrary verdicts of acquittal in rape cases, e.g. insufficient resistance and possible unchastity by the victim. Under the Trial Court's charge in the rape case (See Sealfon v. United States, 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237 [1948] and Turner v. Arkansas, 407 U.S. 366, 32 L.Ed.2d 798, 92 S.Ct. 2096 [1972]), the

jury could have acquitted Respondent Prince on numerous grounds relating to rape but having nothing to do with robbery. Compare United States v. Adams, 281 U.S. 202, 74 L.Ed. 807, 50 S.Ct. 269 (1930). All things on balance, it is far more likely that the jury acquitted Prince of rape on the insufficiency of the evidence of rape than any other issue.

There is simply no way that the rulings of the Alabama Appellate Courts can be reconciled with any of this Honorable Court's decisions on collateral estoppel.

ARGUMENT

The Alabama Courts were "...unable to distinguish this case from Ashe v. Swenson, 397 U.S. 436 [25 L.Ed.2d 469, 90 S.Ct. 1189] (1970)...." See Appendix "B". This is remarkable, since this case is nearly the antithesis of Ashe. Ashe was accused of committing the same crime, robbery, on different persons; this Respondent was accused of committing entirely different crimes, rape and robbery on the same person. In Ashe, "...The proof that an armed robbery had occurred...was unassailable...." (397 U.S. 436, 438, 25 L.Ed.2d 469, 472); here the evidence that a rape had occurred was weak and may have been insufficient as a matter of law.[21] In Ashe, "...Defense counsel made no attempt to question... [the victims']...testimony regarding the holdup...." (Ibid), while here defense

[21]See page 44-45, below.

counsel vigorously questioned the resistance made by the victim, bringing out that she did not scream, submitted to the abduction although she never saw a gun and took her own clothes off rather than let the defendant do it. In addition, defense counsel moved to exclude the State's evidence for failure to prove a prima facie case of rape. As to the identification, in Ashe "...[T]he State's evidence that the petitioner [i.e. Ashe] had been one of the robbers was weak...." (Ibid). In fact, no witness could positively identify Ashe as one of the masked robbers. In the instant case, the perpetrator wore no mask and Respondent Prince was positively identified by the victim as the perpetrator shortly after the attack and at trial. In addition, Officer Allen positively identified Respondent Prince

as the person he saw abandoning the vehicle the perpetrator stole from the victim. The instant case is, to say the least, easily distinguishable from Ashe v. Swenson, above.

REASON FOR GRANTING THE WRIT: CONFLICT WITH PRIOR SUPREME COURT DECISIONS.

In Ashe v. Swenson, (397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 [1970]) this Honorable Court read into the Fourteenth Amendment the doctrine of collateral estoppel. The doctrine of collateral estoppel in criminal cases goes back to United States v. Oppenheimer, (242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 3 A.L.R. 516 [1916]). In Oppenheimer this Court ruled that where two offenses occurred at

the same time, an acquittal of one under the statute of limitations barred the second. As applied to the states in Ashe, in cases involving general verdicts, the doctrine has two parts:

> "[1]...Where a previous judgment of acquittal was based upon a general verdict, as is usually the case...[the doctrine of collateral estoppel]..requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, ...[and] [2. Determine]...whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration...." (Ash v. Swenson, 397 U.S. 436, 444, 25 L.Ed.2d 469, 475-476, 90 S.Ct. 1189 [1970])

The Alabama Courts violated both parts of this principle.

I.

CONFLICT ON HOW THE ISSUES IN THE FIRST TRIAL SHOULD BE IDENTIFIED.

In determining what were the issues in the rape trial the Alabama Courts did not look beyond the defense evidence. The Court of Criminal Appeals of Alabama did not even have before it the pleadings in the rape case, as required by Ashe v. Swenson, (397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 [1970]). See Duncan v. Tennessee, 405 U.S. 127, 31 L.Ed.2d 86, 92 S.Ct. 785 (1972). This may not have been harmful, but the Court's treatment of the evidence was grossly harmful.

The Alabama Courts considered that the issues raised and decided in the rape case were only those touched on by defense evidence. Respondent Prince presented evidence only on identification, and the Alabama Courts concluded

that, therefore, identification was the only issue in the rape case. Obviously, Respondent Prince could not as a practical matter have presented defense evidence attempting to prove: He wasn't there, but, if he was, he did not have sexual intercourse with this woman, and, if he did, she consented, and, if she didn't consent, she didn't make "...earnest resistance...."[22] However, Respondent Prince raised each of these points: An alibi by defense evidence and the other points by cross examining the State's witnesses. Even if Prince had done nothing at all, the weakness of the State's evidence as to the corpus delecti of rape should have been examined by the Appellate Court. But, the Alabama Courts looked no farther than the defense

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[22] Title 13A, Section 13A-6-60(8), Code of Alabama, 1975; Appendix "C", page 23.

evidence, and this conflicted with the first part of the Ashe doctrine. Compare Simpson v. Florida, (403 U.S. 384, 29 L.Ed.2d 549, 91 S.Ct. 1801 [1971]) where a case was vacated and remanded under Ashe because the trial judge did not review the entire transcript of the first trial, in applying the collateral estoppel doctrine. See on remand Simpson v. State, 250 So.2d 656 (S.Ct. Fla. 1971).

II.

CONFLICT AS TO DETERMINING WHETHER IDENTIFICATION WAS DECIDED BY THE JURY IN THE RAPE CASE.

Having decided that identification was the only issue in the rape case, the state courts naturally decided that it was decided by the verdict in that case. Had the state courts looked beyond the defense evidence, they would have seen that there were numerous issues relating

only to rape on which the jury could have acquitted Respondent Prince of rape, even if they believed that he had attacked the victim.

The State's evidence as to the corpus delecti of rape was extremely weak. The victim's testimony indicated that Prince forced his penis inside her, but the prosecutor never asked the victim about the precise nature of the pentration. For all that appears, the victim could have been testifying to deviate sexual intercourse[23], in which case the crime would have been criminal sodomy[24] not rape. The evidence was probably

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[23]Title 13A, Section 13A-6-60(2), Code of Alabama, 1975, Appendix "C", page 23.

[24]Ibid, Sections 13A-6-63 and 64, Appendix "C", pages 24-26.

insufficient to prove rape.[25] Had Prince's motion to exclude the State's

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[25] Reynolds v. State, 274 Ala. 171, 146 So.2d 85 (1962):

> "...'Carnal Knowledge', as used in the statute, means sexual intercourse, that is, the actual penetration of the male sexual organ into the sexual organ of the female...." (146 So.2d 85-86)
>
> "...There is no evidence whatever supporting the charge of carnal knowledge. Nor does the evidence support the charge of abuse in the attempt to have carnal knowledge. While there is ample evidence showing an abuse of the child, we find no evidence showing an abuse of her genital or sexual organs..."
>
> "The medical testimony, as well as that of other witnesses, shows only that the rectum and the area around the rectum were bruised or injured. We find nothing whatever in the evidence showing any abuse or injury of the girl's genital or sexual organs...." (146 So.2d 85, 87)

evidence addressed only the sufficiency of the evidence of rape rather than compounding it with collateral estoppel, the trial court would probably have granted it. Had the jury convicted Prince of rape, the conviction would no doubt have been set aside on motion for a new trial or appeal.

In addition to the sufficiency of the evidence, how often have accused rapists been acquitted merely because their victims "didn't scream loud enough" or "didn't fight hard enough" or "didn't defend their 'virtue' with their lives"? Rational people condemn such verdicts, but it would be naive to deny that they happen. Prince raised each of these issues by cross examining the victim. Juries also often acquit accused rapists on the grounds that the victim was

allegedly not chaste.[26] The examining physician's testimony that the victim was a "...woman accustomed to sexual intercourse...." (D. Ex. p. R-73), could certainly have been taken by some to mean that she was unchaste.

Then there is the trial court's charge to the jury on rape. See Sealfon v. United States, 332 U.S. 575, 92 L.Ed. 180, 68 S.Ct. 237 (1948) and Turner v. Arkansas, 407 U.S. 366, 32 L.Ed.2d 798, 925 S.Ct. 2096 (1972). The defense had brought out that incident to the struggle with Prince, the victim had hit her head so hard that her vision blurred. The trial court charged the jury in detail on the corpus delecti of rape and stated

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[26]This is such a problem that many states, including Alabama, have by statute limited the extent to which an accused rapist can inquire into the victim's general sexual activities. See Title 12, Section 12-21-203, Code of Alabama, 1975.

the standard of proof in pertinent part as follows:

> "...The main provision of the law is that there should not be a conviction under the evidence unless to a moral certainty it excludes every reasonable hypothesis other than that of the guilt of the accused...." (D. Ex. p. R-173)

Now suppose that instead of merely suffering blurred vision, the victim had actually been rendered momentarily unconscious or semi-conscious by the blows to her head and in that state and in her terror, she had fantasized two rapes lasting a total of twenty minutes. Would this not be a "reasonable hypothesis" explaining the evidence "other than the defendant's guilt" of rape? In this context, it must be recalled that the jury was not asked to decide if a rape had occurred but only whether the State proved rape beyond a reasonable doubt. Perhaps if the jury

had been asked to consider lesser included offenses, they would have returned such a verdict, but they were not asked to consider such offenses. Their choice was guilty of rape or not guilty. It can't be said that a not guilty verdict on the rape charge represented a finding that no offense at all took place or that the defendant was not guilty of participation in the attack on the victim.

The importance of there being no rational basis for the first verdict other than a favorable finding on the issue which the defendant seeks to foreclose was made clear long before Ashe v. Swenson, (397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 [1970]). Fourteen years after he authored the opinion in United States v. Oppenheimer, (242 U.S. 85, 61 L.Ed. 161, 37 S.Ct. 68, 3 A.L.R. 516 [1916]), Justice Holmes authored

opinion in United States v. Adams, (281 U.S. 202, 74 L.Ed. 807, 50 S.Ct. 269 [1930]). Adams had been acquitted of fraud by making false entries in a bank's books. He was later charged with making other false entries as part of the same fraud (Case No. 281) and with making a false report of the bank's financial condition based on the various false entries (Case No. 282). The District Court held that both prosecutions were barred under Oppenheimer. This Honorable Court agreed with regard to Case No. 281 (false entries) but reversed as to Case No. 282 (false report). Justice Holmes' reasoning was as follows:

> "...An alternative possible ground [for the acquittal in the false entries case] is that although the entries were untrue the defendant believed them to be true or for some reason believed them to be justified. However unlikely

> it may be that there was a different intent at the time of the later act from that with which the entries were made in the books of the bank, it is entirely possible that the defendant supposed himself to be acting lawfully at the earlier moment, but that he had acquired more accurate knowledge before he signed the report, that he then knew that it was false and was guilty then although not before...." (281 U.S. 202, 205, 74 L.Ed. 807, 809; emphasis supplied)

Thus, the doctrine of collateral estoppel does not apply where there is an alternative possible ground for the first verdict which does not involve the issue which the defendant seeks to foreclose, ...[h]owever unlikely..." that ground may be. In the instant case, there is not only a possible ground in the alternative to the non-identification of the accused as the perpetrator for the acquittal in the rape case, that alternative ground, the insufficiency of the

proof of rape is, all things on balance, the most likely ground for the acquittal. Compare United States v. Giarratano, 622 F.2d 153 (5th Cir. 1980); State v. DeSchepper, 304 Minn. 399, 231 N.W.2d 294, 89 A.L.R. 3rd. 1084 (1975) and Jackson v. Follette, 462 F.2d 1041 (2nd Cir. 1972); cert. den. 409 U.S. 1045, 34 L.Ed.2d 496, 93 S.Ct. 544.

SUMMATION

There is simply no way that the decisions of the Alabama Appellate Courts in this case can be reconciled with any decision which this Honorable Court has ever handed down on collateral estoppel.

CONCLUSION

In conclusion, the Petitioner, the State of Alabama, respectfully submits that the decisions and opinions of the Honorable Court of Criminal Appeals and Supreme Court of Alabama in this case present conflicts with every prior decision and opinion of this Honorable Court on collateral estoppel under the Fifth and Fourteenth Amendments to the U.S. Constitution. For this reason the Petitioner prays that this Honorable Court will issue the writ of certiorari and review the decisions and opinions of the Honorable Appellate Courts of Alabama and on such review will reverse the decisions of said Courts holding that Respondent Prince's acquittal of rape

barred his prosecution and conviction of robbery in the third degree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama, Petitioner, do hereby certify that on this _____ day of June, 1983, I did serve the requisite number of copies of the foregoing on the Attorney for Chris Prince, Respondent, by mailing same to him, first class postage prepaid and addressed as follows:

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